IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. [redacted] 68

CITY OF HAMMOND, A MUNICIPAL CORPORATION,
Petitioner,

vs.

PANAMA EAST LINES AND TRANSPORTATION COMPANY, A CORPORATION, *Respondent.*

PETITION OF CITY OF HAMMOND, INDIANA FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LOUIS T. MICHAELS,
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OLIVER CLEVELAND,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. —.

CITY OF HAMMOND, A MUNICIPAL CORPORATION,
Petitioner,

vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A CORPORATION, *Respondent.*

PETITION OF CITY OF HAMMOND, INDIANA, FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To The Honorable The Supreme Court of The United States:

The petitioner, the City of Hammond, Indiana, respectfully prays that a writ of certiorari may issue directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment and

decree of that Court entered on the 12th day of March, 1926, reversing a decree of the District Court of the United States for the District of Indiana, with directions to said District Court to enter a decree granting an injunction as prayed for by respondent.

STATEMENT OF THE CASE.

Petitioner is a municipal corporation organized under the general laws of the State of Indiana. Respondent is a corporation organized under the laws of the State of Illinois, and engaged in operating a line of motor vehicles as a common carrier of passengers for hire between the City of Hammond, Indiana, and points in the State of Illinois, loading and unloading passengers in the streets of Hammond without a grant from the City. While respondent was so operating, without right and without hindrance, the General Assembly of Indiana placed motor transportation under the Public Utility Law (Ind. Laws 1925, chap. 46, p. 138) leaving certain cities including Hammond, in local control (sec. 5, p. 140, Appendix "A," p. 21).

On May 23rd, 1925, the City of Hammond enacted Ordinance No. 1945 (Appendix "D" p. 23) by section 1 of which it was made unlawful to move or run a motor vehicle engaged in transporting passengers for hire upon certain named streets of the city; by section 2 of which it was made unlawful for the operator of any such vehicle to stop the same to receive or discharge passengers upon any street or other public place within the city. This section contained a proviso that the Board of Public Works might grant permits for such purpose on certain named streets and parts of streets. Section 3 provided that the ordinance should not be so construed as to impair the ob-

ligation of any contract to which the city is a party, under which such vehicles "are now operated for hire within said city."

Respondent instituted suit for temporary and permanent injunction in the District Court for the District of Indiana, seeking to enjoin petitioner from enforcing any part of said ordinance, alleging therein that it is a corporation and citizen and resident of the State of Illinois, and its right to maintain suit on the ground of diversity of citizenship, and on the further ground that the ordinance was violative of the commerce clause and the Fourteenth Amendment (Rec. 1-6).

Respondent also claimed the protection of a certificate of convenience and necessity issued to it by the Public Service Commission of Indiana, after the commencement of the suit.

Issues were joined, and by agreement, the evidence introduced on the motion for temporary injunction was considered as evidence upon the final hearing. The motion for temporary and permanent injunction was denied, and judgment rendered for the defendant (Rec. 66).

Respondent then appealed to the Circuit Court of Appeals for the Seventh Circuit, which entered a decree holding the ordinance void, reversing the order of the District Court, and directing that the injunction be granted (Rec. 83-84). The case was decided on the same day as *Schappi Bus Line vs. City of Hammond*, and the discussion of that case permitted to stand as the opinion of the Court in this case (Rec. 83).

Petitioner files herewith, and as a part hereof, a certified transcript of the record in the Circuit Court of Appeals for the Seventh Circuit.

REASONS FOR THE ISSUANCE OF THE WRIT.

Petitioner avers that the decree of the Circuit Court of Appeals for the Seventh Circuit is erroneous in the following particulars:

1. By its finding that respondent is a corporation of the State of Indiana, whereas the pleadings aver, and the uncontradicted evidence is, is that it is organized only in the State of Illinois, is "a resident and citizen" of that State, and therefore is not within the privileges and immunities clause of the Fourteenth Amendment of the Constitution.

2. By its confusion of police regulations with the general police power, and holding that the ordinance was a mere traffic regulation, whereas it was an exercise of the general police power to prevent the use of streets for the conduct of the private business of a common carrier without an express grant or franchise.

3. By its ruling that respondent had rights on the streets of Hammond arising out of a certificate of the Public Service Commission of the state. Such ruling is erroneous, because

(a) Respondent being a corporation and citizen of the State of Illinois cannot lawfully receive a certificate of convenience and necessity, it being provided by statute in Indiana that

> "No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state."
>
> Sec. 99, Ind. Laws, 1913, chap. 76, p. 201; Burns' R. S. Ind. 1914, sec. 10052v3.

(b) It is uncontradicted in the record that at the time the certificate of convenience and necessity was issued to respondent, and at the time the ordinance in question was adopted, the City of Hammond was receiving motor transportation under a franchise contract theretofore granted by said city to Calumet Motor Coach Company, and petitioner avers that it has sole jurisdiction of the establishment and regulation of such service within its limits, by reason of the exception appearing by proviso in section 5 of the Act under which the Public Service Commission granted the certificates, such exception and proviso reading as follows:

> "That in any city or town of this state where motor transportation is now furnished under, or by color of a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the Supreme Court."

Chap. 46, Ind. Laws 1925, p. 140, Appendix "A."

4. The petitioner avers that the Circuit Court of Appeals erred in holding the ordinance void, because it found that there was discrimination in its enforcement, petitioner not enforcing it against a corporation having a franchise contract to operate over the

streets mentioned in Section 1, and to receive and discharge passengers in the streets wherever it operates; the effect of the decision of the Circuit Court of Appeals being that the city has no power to grant a franchise to one to transact public business in the streets, and to prohibit non-franchise holders from doing the same thing, contrary to law and the decision of the Supreme Court of Indiana in *Farmers Tel. Co. vs. Boswell*, 187 Ind. 371. The two decisions are in conflict.

5. Petitioner avers that the Circuit Court of Appeals decided the case contrary to law and the decision of the Supreme Court of Indiana in *Frick vs. City of Gary*, 192 Ind. 76, that the transaction of business similar to that of respondent in a public place is not a right, but a mere privilege which may be granted or withheld by the municipality, and in *Denny vs. City of Muncie* (November 24th, 1925), 149 N. E. Rep. 639 (not yet officially reported), that under motor vehicle regulation laws similar to the law now in force, the city possessed power to prevent the use of certain streets by common carriers of passengers by motor vehicle, and that the city has exclusive power to control and care for its streets. The decision of the Court of Appeals is in conflict with the two Indiana decisions cited.

6. The Circuit Court of Appeals traveled on the erroneous theory that respondent is entitled to the protection of the Fourteenth Amendment, whereas, if it has any claim of right to attack the ordinance, it is by reason of the protection of the commerce clause in the Constitution. The decision of the Circuit Court of Appeals is not placed on that theory, and it does not state upon what right it has considered respondent's case, but petitioner avers that the question of the ex-

tent of immunity from local regulations to be enjoyed by an interstate motor carrier was clearly presented to the Circuit Court of Appeals by the record made in the District Court, that it is the only question in the case, and it is of such sufficient general importance that it should be decided by this Court.

7. The record (Rec. 1-6) presented to the Circuit Court of Appeals the question whether an interstate carrier could, as against reasonable local regulations, choose the streets for the route to his terminal, and the question whether using the streets for receiving and discharging passengers was such an incident of interstate commerce as to give immunity from local prohibition by the city having exclusive jurisdiction of its streets under the statutes creating it. These questions petitioner avers to be of sufficient general importance that they should be decided by this Court.

Wherefore petitioner prays that a writ of certiorari issue out of and under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in this cause, and that this court thereupon will proceed to correct the errors complained of, and affirm the judgment and decree of the District Court; and your petitioner will ever pray.

CITY OF HAMMOND,

By LOUIS T. MICHENER,
LOUDEN L. BOMBERGER,
GLENN D. PETERS,
JOHN A. GAVITT,
CLYDE CLEVELAND,
Its Attorneys.

We certify that we are attorneys for the petitioner herein; that the allegations contained in said petition are true, and that said petition is in our opinion well founded in point of law.

LOUIS T. MICHENER,
LOUDEN L. BOMBERGER,
GLENN D. PETERS,
JOHN A. GAVIT,
CLYDE CLEVELAND.

District of Columbia, ss:

LOUIS T. MICHENER, of lawful age, being first duly sworn according to law, deposes and says, that he is one of the attorneys for the petitioner in the above entitled case; that he knows the contents of the foregoing petition, and that the statements of fact therein made are true.

.....

Subscribed and sworn to before me, a Notary Public in and for said District, on this — day of May, 1926.

.....
Notary Public.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. —.

CITY OF HAMMOND, A MUNICIPAL CORPORATION,
Petitioner,

vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A CORPORATION, *Respondent.*

BRIEF ON PETITION FOR CERTIORARI.

REFERENCE TO OFFICIAL REPORT.

The opinion delivered by the Circuit Court of Appeals is not yet reported, but is found on page 83 of the Record. No opinion was written in the District Court. The Circuit Court of Appeals wrote no opinion except to follow its decision in *Schappi Bus Line vs. City of Hammond,* decided on the same day, ordering the District Court to enter a decree granting the injunction (Rec. 83).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED HERE.

(1) On March 12th, 1926, the opinion of the Court was filed (Rec. 101) and on the same date an order was entered reversing the cause, with a mandate to the District Court to enter a decree granting the injunction (Rec. 84).

(2) The Circuit Court of Appeals erroneously found that respondent is an Indiana corporation and

decided the case on the theory that the petitioner was discriminating between two citizens of that state in the enforcement of a police regulation. (Opinion in *Schappi case*, Rec. 104.) Respondent is not a citizen of Indiana within the privilege and immunity clause of the Fourteenth Amendment.

(3) The Circuit Court of Appeals erroneously applied the principle of uniformity of police or traffic regulations to a case which involved the exercise of the general police power conferred upon petitioner to prevent the use of its streets for the private business of hauling passengers as a common carrier by motor vehicle. (Opinion in *Schappi case*, Rec. 104, 5.)

(4) The respondent being a corporation and citizen of Illinois (Rec. pp. 1-12), could not invoke the protection of the privilege and immunity clause in operating its vehicles in Indiana, and although the opinion of the Circuit Court of Appeals does not indicate upon what basis it entertained respondent's claim of right, it is evident that it must have been upon that ground alone.

(5) Respondent claimed the right to operate on the streets of Hammond under a certificate of convenience and necessity issued by the Public Service Commission of Indiana (Rec. p. 53), which was given weight by the Circuit Court of Appeals (Opinion in *Schappi case*, Rec. 101). Petitioner denies the validity of this certificate for the reasons that:

(a) Respondent being a corporation and citizen of the state of Illinois could not lawfully receive it because of the prohibition of Section 99 Ind. Laws 1913, chap. 76, Burns R. S. 1914, sec. 10052v3, copied on p. 4 of the petition.

(b) That the exception in section 5 of the Moore-

head Law, being chap. 46, p. 138, Ind. Laws 1925 (Opinion in *Schappi case*, p. 103) gave petitioner sole jurisdiction of motor coach traffic within its limits. See Appendix "A," page 18.

(6) The Circuit Court of Appeals has decided a local question, that is, the right of the city of Hammond to grant a franchise to one carrier, and deny to another the privilege of rendering the same service, contrary to the decisions of the Supreme Court of Indiana, as expressed in *Frick vs. City of Gary*, 192 Ind. 76, in which it was held that an individual who engages in the conduct of business in a highway without obtaining a franchise to do so, has no property right to continue it, and that he has no inherent right to select a street or streets for use for the purpose of loading and discharging passengers, and to forbid him to do so does not invade his constitutional rights, and the decision of that Court in *Denny vs. City of Muncie*, 149 N. E. Rep. 639, in which it held that the operation of busses on a public street is a matter of privilege, and not of right, which can be permitted by the city upon such terms as it may prescribe or may be prohibited. There is thus a conflict between the State Courts and the Circuit Court of Appeals.

(7) The decision of the Circuit Court of Appeals practically nullifies the value of a franchise (Opinion in *Schappi case*, Rec. 105) and thus conflicts with the local decisions as evidenced by the decision of the Supreme Court of Indiana in *Farmers Telephone Company vs. Boswell Telephone Company*, 187 Ind. 371, in which it is held that franchises for the use of public highways may be granted or withheld, and in thus exercising its police powers the state may make discriminations and distinctions, and judge of the reasonableness thereof.

(8) The Record presented to the Court of Appeals two questions of respondent's rights as an interstate carrier:

(a) The question whether it could move its vehicles over certain streets forbidden by section 1 of the ordinance.

(b) The question whether it could use the streets of the city to receive and discharge interstate passengers in violation of section 2 of the ordinance.

Neither question is discussed or decided by the Circuit Court of Appeals.

(9) The question of local control of interstate carriers by motor vehicles on highways, and the extent to which such carriers are immune from such control by the commerce clause was presented to the Circuit Court of Appeals (Rec. 1-6, 54-61) was not considered by the Court and is a matter of general public concern which should be decided by this Court.

(10) The Circuit Court of Appeals found that petitioner was discriminating against respondent by permitting a franchised company to do what the ordinance prohibited. Upon this finding the Court erroneously held that the ordinance itself was void, although no defects appeared upon its face (Opinion in *Schappi case*, Rec. 105).

(11) The Circuit Court of Appeals found that the ordinance was not necessary to prevent congestion (Opinion in *Schappi case*, Rec. 104) basing its finding upon the fact that parking was permitted to the extent of one hour on both sides of the streets in question. The Court thus attempted to set up its own judgment against that of the municipal council on a legislative question as to the manner and from what standpoint congestion should be attacked. The record shows without contradiction that the streets are narrow, and

much congested, and large sums are being expended to widen the same (Rec. 54-57).

(12) Section 240 of the Judicial Code as amended by Act of February 13th, 1925, confers upon this Court jurisdiction to require by certiorari, either before or after judgment or decree by a Circuit Court of Appeals, that a case be certified therefrom to this Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought by unrestricted writ of error or appeal. Section 129 of said Code, as amended by said Act, provides that said section 240, as amended, shall apply to the granting or refusal of an injunction. The mandate to the District Court to enter the injunction because the ordinance is void ended the case.

STATEMENT OF THE CASE.

The facts in this case differ from the facts in the *Schappi case* only with reference to the respondent's business and the route which it has used in petitioner city. Respondent had one line entering the city from the south coming on Hohman Street, the principal business street, north to a ticket office on Sibley Street, one-half block east of Hohman Street, where it stopped its coaches in the street to receive and discharge passengers. (See map, Rec. 49, route indicated by red line.) In so doing, it violated Ordinance No. 1945 in two particulars: (1) By running two blocks on Hohman Street and one-half block on Sibley Street, forbidden by the first section of the ordinance, and (2) in stopping to receive and discharge passengers in Sibley Street in violation of the second section. These forbidden parts of streets are marked in blue on the map (Rec. 63). Streets on which permits to receive

and discharge passengers may be granted are indicated in green, and those over which it may move without stopping to transact business are indicated in red on said map.

It appears by the affidavit of respondent's Superintendent (Rec. 53) that since the filing of the complaint, the Public Service Commission of Indiana issued to respondent a certificate of convenience and necessity to operate its line over the route shown on the map (Rec. 49). The part of Sibley Street used by respondent for its depot grounds is probably the most congested part of the city (Rec. 60).

One of the chief grounds of complaint urged by respondent was the fact that it attempted to operate some kind of co-ordinated service with the Gary Street Railway, which is a street car line on Sibley Street (Rec. 52).

Petitioner submits that the bill for injunction presented the identical questions of law that were raised in the *Schappi case*.

ERRORS ASSIGNED.

Petitioner assigns the following errors:

(1) The Circuit Court of Appeals for the Seventh Circuit erroneously found that respondent is a corporation of the State of Indiana, thus giving it a standing to make claims of right which a foreign corporation could not make.

(2) The Circuit Court of Appeals for the Seventh Circuit erroneously held that petitioner's Ordinance No. 1945 was illegal and void, because it permitted franchised carriers to do what respondent was forbidden to do.

(3) The Circuit Court of Appeals for the Seventh Circuit erroneously held that it is unlawful to permit a franchised carrier to do that which is denied one having no franchise.

(4) The Circuit Court of Appeals for the Seventh Circuit erroneously set up its own judgment against that of a municipal legislature on a purely legislative question, that is to say, whether congestion in the streets should be relieved in one manner or another, and held that because one form of congestion was permitted (*i. e.* parking), the municipality was without authority to condemn or prohibit another.

(5) The Circuit Court of Appeals for the Seventh Circuit erroneously confused the duty of the municipality to make and apply police regulations uniformly with its right under the general police power to determine, in the first instance, what, if any, carrier, should be permitted to use the streets.

(6) The Circuit Court of Appeals for the Seventh Circuit erroneously held that the granting of a franchise and consequent exemption of the franchised company from an ordinance forbidding others to do what the franchised company was permitted to do, was an unlawful bartering away of the police power to the franchised company.

(7) The Circuit Court of Appeals for the Seventh Circuit erroneously held that the ordinance was void, although the only fault it claimed to find with it was in the matter of its enforcement.

(8) The Circuit Court of Appeals for the Seventh Circuit erred in reversing the decree of the District Court of the United States for the District of Indiana, and in directing that court to enter a decree granting the injunction.

BRIEF OF ARGUMENT.

Respondent made the same claims as to interstate commerce that were made in the *Schappi case,* but did not attempt to transact local business in Indiana. The question is therefore strictly an interstate one. If petitioner city has the jurisdiction over its streets which it is advised it has under the laws of Indiana, and the Public Service Commission has no jurisdiction therein, and especially none to establish interstate commerce, then the ordinance is valid, unless it is an undue burden upon respondent's interstate business. Respondent, like respondent in the *Schappi case,* is claiming the right to use the streets as a place of transacting private business for profit. If its interstate character confers such right as an incident of the business, then the ordinance cannot prevent it. If, on the other hand, receiving and discharging passengers in a street is more than a mere incident of the right to move under the protection of the commerce clause, the ordinance prevails.

The point is made in the instant case that a great many people in Illinois have no other convenient means of getting to the petitioner city, and the coordinated service between respondent and the Gary Railway Company, which operates a street railway, is made less convenient. These, of course, are considerations of a prudential nature which it may be assumed were duly considered by the City Council of petitioner city, and that in exercising its judgment on the question, it was not moved to act against the paramount public interests.

Erie R. Co. vs. Board of Public Utility Comrs.,
245 U. S. 394.

This Record presents the identical error of fact that appears in the *Schappi case*, namely, a finding by the Circuit Court of Appeals that respondent is a corporation of the State of Indiana. The Record shows quite the contrary, and jurisdiction is invoked in the opening sentences of the Bill of Complaint solely on the ground of diversity of citizenship (R. 1).

The authorities and argument presented in the brief to support the petition for the writ in the *Schappi case* are respectfully referred to and adopted as the brief and argument in this case.

A reversal of the decree of the Circuit Court of Appeals is respectfully prayed.

Louis T. Michener,
Louden L. Bomberger,
Glenn D. Peters,
John A. Gavit,
Clyde Cleveland,
Attorneys for Petitioner.

APPENDIX "A"

Chapter 46

AN ACT entitled "An act to regulate certain carriers of persons and property by motor vehicle for compensation on the public highways of the State of Indiana, and supplemental to an act entitled 'An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission,' approved March 4, 1913, and declaring an emergency."

(S. 16. Approved March 4, 1925.)

MOTOR VEHICLE CARRIERS—DECLARED TO BE PUBLIC UTILITIES.

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF INDIANA, That every corporation, company, individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any motor vehicle, except as hereinafter provided, for the purpose of transporting passengers or property for compensation as a common carrier upon any of the public highways of the State of Indiana is hereby declared to be a public utility within the meaning of the act of the general assembly of the State of Indiana entitled: "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission," approved March 4, 1913, and, except as herein provided, subject to all the terms and provisions of said act, in so far as the terms and provisions of said act may be reasonably applicable to such carriers.

PUBLIC SERVICE COMMISSION—CERTIFICATE OF CONVENIENCE AND NECESSITY —EXISTING CARRIERS.

SEC. 2. No motor vehicle, except as hereinafter provided, shall be operated upon any public highway of the State of Indiana for the purpose of transporting passengers or property for compensation as a common carrier until after there shall have been obtained from the public service commission of Indiana a certificate declaring that public convenience and necessity require such operation, and no certificate shall be issued except as hereinafter provided until after a public hearing and a consideration of the service, if any, rendered in the territory of the proposed motor vehicle operation by other motor vehicle common carriers. Such commission is empowered to adopt rules and regulations to govern applications for certificates of convenience and necessity and hearing thereon: *Provided, however,* That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefore, shall receive from the public service commission a certificate of convenience and necessity to continue such operation, upon submitting to the public service commission within thirty days from the taking effect of this act, verified proof in writing of such continued service and complying with the provisions of section 3 of this act, and any certificate owned, held or obtained by any such carrier may be sold, assigned, leased, bequeathed or transferred as other property upon approval by the commission.

DEFINITION OF "MOTOR VEHICLE" AND "PUBLIC HIGHWAY."

SEC. 4. The term "motor vehicle" as used in this act means any automobile or other self-propelled vehicle

not operated or driven upon fixed rails or track, including any trailer thereto attached; and the term "public highway" as used in this act means any public road, street, avenue or alley in the State of Indiana.

VEHICLES TO WHICH ACT IS INAPPLICABLE —LOCAL CONTROL.

Sec. 5. None of the provisions of this act shall apply to the owning, operation, management or control of taxicabs, hotel buses, funeral buses or school buses or to owning, controlling, operating, or managing motor propelled vehicle the major use of which is for private business of the owners and the use of which for hire is only casual or occasional or under special contract or arrangement: and *Provided, further,* That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; but the determination of the question of public convenience and necessity for competing service, shall be subject to appeal to and review by the circuit or superior courts of the county upon complaint of any interested person filed within twenty days after such finding is made, and in the manner now provided by law for procedure in civil cases, including the right of appeal to the supreme court,

HIGHWAY COMMISSION—OTHER AUTHORITIES—JURISDICTION, POWERS.

Sec. 10. This act shall be supplementary to the act entitled "An act concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of

the railroad commission on the public service commission," approved March 4, 1913: *Provided, however*, That none of the provisions of this act shall operate to deprive the state highway commission of Indiana or any other public authorities of any jurisdiction it or they now has or have or which may hereafter be conferred upon it or them over the public highways of the state, nor prevent said state highway commission of Indiana or other authorities from suspending, at any time, the right of motor buses to operate on any public highway where necessary to preserve said highway.

APPENDIX "B"

Chapter 213

AN ACT providing for the registration and licensing of motor vehicles, motor bicycles, tractors, trailers and semi-trailers, for the regulation of the use and operation thereof on the public highways, defining chauffeurs and providing for the examination and licensing thereof, the suspension and revocation of licenses, and the transfer of ownership, requiring the keeping of certain records of motor vehicles, motor bicycles and motor trucks for which storage, supplies or repairs are furnished, providing that liens may be taken thereon, and prescribing penalties for the violation thereof.

(H. 103. Approved March 14, 1925.)

MUNICIPAL REGULATIONS—CITY AND TOWN LICENSES.

Sec. 45. Except as herein otherwise provided, no city, town or other municipal corporation shall have any power or authority to make any ordinance, by-laws or resolution, limiting or restricting the use or speed of motor vehicles or motor bicycles, and no ordinance, by-laws or resolution heretofore or hereafter

made by any city, town or other municipal corporation within this state, by whatever name known or designated, in respect to or limiting the use of motor vehicles or motor bicycles, shall have any force, effect or validity, and all such ordinances, by-laws and resolutions are hereby declared to be of no validity or effect. Nothing in this act contained shall be construed as affecting the power of cities, towns and other municipal corporations to make and enforce ordinances, rules and regulations affecting motor trucks and motor driven commercial vehicles which are used within the limits of such municipal corporations for public hire, or from making and enforcing reasonable traffic and other regulations, except as to rates of speed, not inconsistent with the provisions of this act. A license issued by any city or town for any motor truck or motor driven commercial vehicle used for hire shall be valid in every city and town of the state for and during the year for which such license is issued, and only one such city or town license shall be required for any such motor vehicle for any one year.

APPENDIX "C."

Chapter 76.

AN ACT concerning public utilities, creating a public service commission, abolishing the railroad commission of Indiana, and conferring the powers of the railroad commission on the public service commission.

(Approved March 4, 1913.)

MUNICIPAL COUNCIL—POWERS.

Sec. 110. Every municipal council shall have power, (a) to determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility furnishing any product of service within said mu-

nicipality and all other terms and conditions not inconsistent with this act upon which such public utility may be permitted to occupy the streets, highways, or other public property within such municipality, and such contract, ordinance or other determination of such municipality shall be in force and *prima facie* reasonable. Upon complaint made by such public utility or by any qualified complainant as provided in section 57 the commission shall set a hearing as provided in sections 57 to 71 and if it shall find such contract, ordinance or other determination to be unreasonable, such contract, ordinance or other determination shall be void. (b) To require of any public utility by ordinance or otherwise such additions and extensions to its physical plant within said municipality as shall be reasonable and necessary in the interest of the public, and to designate the location and nature of all such additions and extensions, the time within which they must be completed and all conditions under which they must be constructed subject to review by the commission as provided in subdivision (a) of this section. (c) To provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the provisions hereof. (d) The power and authority granted in this section shall exist and be vested in said municipalities anything in this act to the contrary notwithstanding. (Here follow provisions for an appeal on the question of additions to plant.)

APPENDIX "D."

ORDINANCE NO. 1945.

AN ORDINANCE REGULATING AND ROUTING CERTAIN VEHICLES FOR HIRE AND PROHIBITING THEIR USE OF CERTAIN STREETS WITHIN THE CITY OF HAMMOND.

Section 1. BE IT ORDAINED BY THE COMMON COUNCIL OF THE CITY OF HAMMOND, INDIANA, That in order to promote public safety and order and

to diminish the congestion of vehicular travel within said City, from and after the taking effect of this Ordinance it shall be unlawful for any person, firm or corporation owning or operating any motor vehicle engaged in transporting passengers for hire, to move or run such vehicle on, upon or over any of the following parts of streets within said City of Hammond, to wit:

On Hohman Street from Russell Street to Michigan Avenue;

On State Street from Morton Court to Calumet Avenue;

On Sibley Street from the easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company where the same crosses Sibley Street westerly to Morton Court;

On Fayette Street from Hohman Street to Oakley Avenue.

Section 2. From and after the taking effect of this ordinance it shall be unlawful for any person, firm or corporation owning or operating any motor vehicle carrying passengers for hire, to stop such vehicle for the purpose of receiving or discharging passengers upon any street, alley or other public place within said City; provided that the Board of Public Works may, for any period not exceeding six (6) months or successions thereof, permit such operation on any or all of the following designated parts of streets; Columbia Avenue between the south city limits and the right of way of the Michigan Central Railroad where the same crosses said Columbia Avenue; Sibley Street from Columbia Avenue to the easterly line of the right of way of the Chicago, Indianapolis & Louisville Railway Company; State Line Street from its southerly terminus to its northerly terminus at or near the right of way of said Michigan Central Railroad aforesaid; Rimbach Avenue from State Line Street to Ann Street; Ann Street from Rimbach Avenue to Russell Street; Russell Street from Ann Street to State Line Street, and for vehicles engaged strictly in interstate com-

merce, any street or other public place north of 122nd Street and east of Calumet Avenue.

Section 3. Whoever violates any of the provisions of Sections 1 and 2 of this ordinance, shall, upon conviction be fined in any sum not exceeding fifty ($50.00) dollars for each and every offense, but nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party, under which such motor vehicles are now operated for hire within said City. Nothing herein shall apply to taxicabs.

Section 4. This Ordinance shall supplement such ordinances as are now in force, and repeal only so much of them or any part thereof as may be in direct conflict herewith.

OCT 21 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1926.

No. [redacted] 68

CITY OF HAMMOND, LAKE COUNTY, INDIANA, A Municipal Corporation, *Petitioner*,

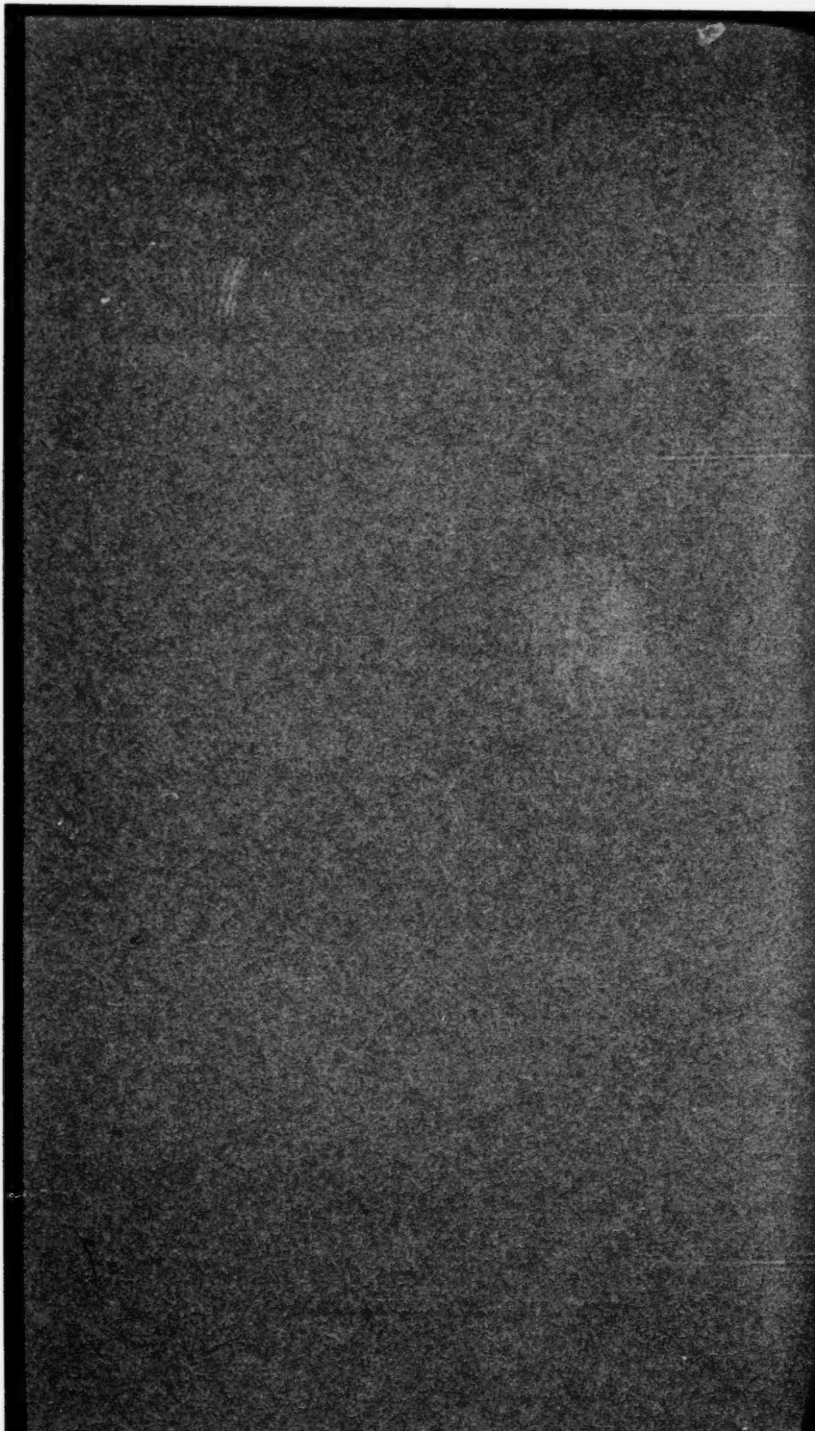
vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A Corporation, *Respondent*.

REPLY TO THE SUGGESTIONS OF RESPONDENT IN ITS OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

LOUIS T. MICHENER,
LOUDEN L. BOMBERGER,
GLENN D. PETERS,
JOHN A. GAVIT,
CLYDE CLEVELAND,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term 1926.

No. 386.

City of Hammond, Lake County, Indiana, A Municipal Corporation, *Petitioner*,

vs.

Farina Bus Line and Transportation Company, A Corporation, *Respondent*.

REPLY TO THE SUGGESTIONS OF RESPONDENT IN ITS OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The position of the Respondent is threefold, and in every respect, Petitioner believes, is untenable. The suggestions of Respondent group under three propositions:

1. Reliance upon the facts which it asserts.
2. A claim that it has an inherent right, incident to its right to carry interstate commerce, to load and unload its passengers in the streets.

3. It claims that it may do all within the petitioner city that a franchise carrier may do. From this it argues that inasmuch as the ordinance is not enforced against the franchise carrier, it cannot be enforced against Respondent.

Petitioner asks the consideration of the Court to a very brief discussion of these points.

I.

THE FACTS.

Respondent asserts that this is essentially a fact case. This is not conceded, but on the contrary, the case must be decided on legal principles, and while the statement of facts set up in Respondent's brief is designed to show that the city is in a sense proposing to "kill a goose that lays golden eggs," (*Erie R. Co. vs. Board of Public Utilities,* 254 U. S. 394) still it must be left to municipal discretion to determine whether any more golden eggs are desirable.

The point is made that there is plenty of room on the streets. There is a misleading statement in this respect at page 5 of Respondent's brief, where it is said that Hohman Street is 80 feet in width and well-paved. This is true south of Russell Street, but at Russell Street it narrows to 60 feet, and at this street the real business district begins, so that there is great congestion in this street in the business district. (Rec. pp. 55, 56 and 57). The Respondent is permitted under the ordinance to come in on Hohman Street as far north as Russell Street. On page 6 of Respondent's brief it is said that State Line Street pavement is not suitable for automobile traffic. Reference is made to the testimony of Mr. Gifford, Superinten-

dent of Respondent, who upon being deliberately lead, says that although paved, it is very rough. This assertion is flatly contradicted by the members of the Board of Works of the city, who testify (Rec. p. 59) that "State Line Street is a wide, well-paved street, and ample for the purpose of operating all the service of the plaintiff herein, without undue congestion and without interference or competition of any other bus or transportation line." *It was this evidence that was believed and adopted by the District Court by reason of its finding against the Respondent.* It also appears from the testimony of the members of the Board of Works that the route on State Line Street comes within a block of the courthouse; close to one of the principal hotels, and two of the largest office buildings of the city; immediately in front of one of the largest theaters, and within three blocks of the main business corner of the city (Rec. 59). So it is not conceded, *and was not found by the District Court,* that any undue hardship was imposed upon Respondent or its patrons.

II.

AN INTERSTATE CARRIER HAS NO INHERENT RIGHT TO USE STREETS FOR LOADING AND UNLOADING PASSENGERS.

The authorities appearing at pages 25, *et seq.,* of Petitioner's brief in the *Schappi case,* No. 385, show that there is no inherent right to use the streets as the principal place of conducting one's business. See, particularly, *Hadfield vs. Lundin,* L. R. A. 1918B, 909 (Wash.); *Dickey vs. Davis,* L. R. A. 1915F, 840 (W. Va.). Respondents in both this and the *Schappi case,* rely on *Parker vs. Silverton,* 109 Ore. 298, which

holds that where a carrier obtains a right from the state acting through its agent, the Public Service Commission, such right could not be restricted as to a use of streets to stop for receiving and discharging passengers by the state's other agent, the municipality. Both agencies derive their power from the same source, but, of course, authority granted to one could not be destroyed by the unauthorized act of the other. With an interstate carrier it is different. It has a right to pass over the highways of commerce without undue restriction, but this right is a mere right of passage, and whenever it proposes, within the limits of any state, to use the streets for a purpose which the state may permit or deny to a local carrier, the mere right of passage cannot be relied upon as giving the interstate carrier the privilege of flouting the state authorities and using streets which are dedicated solely to the right of passage for a use which is not common to all.

Authorities like *Callanan vs. Gilman*, 107 N. Y. 360, are not in point, because they involve the right of an adjacent property owner to use the street in a limited way for receiving and discharging his goods. This right is universally recognized.

Both Respondents fall back to the English case of *Rex vs. Cross*, 3 Camp. 224, to support their claim that a stage coach or omnibus may stop in a street long enough to receive and discharge passengers. They mis-apply this case and those that follow it, for they ignore the point of decision which was that Cross could not use the street for a stable yard. No question of right to stop to load or unload was involved, and, of course, no question of interstate commerce. If one had a right from the Crown to operate a stage coach,

it carried with it the right to stop to receive and discharge its passengers. No one would claim that a stage coach or omnibus could be operated on the streets of Hammond without a grant from someone, or against the prohibition to do so without a franchise. The other theory would mean that the franchise was without value, and mere empty words. A merchant, as an incident of his business conducted on private property, may receive and discharge goods at the curb adjacent to his place of business, and may run over the streets for the purpose of receiving and delivering goods, but if he made the streets his principal place of business, it would raise another question. Petitioner concedes that within reasonable limits, that is, without undue restriction as to route, an interstate carrier may haul his passengers freely over the highways between his *termini*, but insists upon the right to say whether such passengers may be received and discharged upon its streets. At least there is nothing in the Fourteenth Amendment to give an interstate carrier such a right.

Packard vs. Banton, 264 U. S. 140.

III.

THE DIFFERENCE BETWEEN RESPONDENT AND A FRANCHISE CARRIER.

The Respondents persistently assert a theory which amounts to this, though probably they would hardly state it so abruptly, that a municipality cannot give a right to a franchise carrier to do that which cannot be done by others at will. It seems that this was the theory adopted by the Court of Appeals. It held

that a police regulation must apply to all alike, overlooking, as Petitioner most emphatically asserts, the difference between the general police power and a mere police regulation. The general police power gives authority to grant franchises, but this means the power in its broadest sense, and not the mere patrolling of streets. Over and over the authorities declare that there is no inherent right to transact business in a street.

Denny vs. City of Muncie (Ind. Sup. Ct.) 149 N. E. 639. When a franchise is granted, a contract is entered into to render a public service, and it is upon the basis of the public welfare that it is granted, and this is not limited to an inquiry into such questions as to whether the streets are congested or not. It is a question of what service is to be rendered the public, and of this the city is the judge. Respondent's position is that though a franchise be granted to operate omnibuses in a street, and there is room for others that have no franchise, the city cannot keep them off.

In support of their contention that the ordinance is discriminatory, Respondents rely upon *Yick Wo vs. Hopkins,* 118 U. S. 356, and similar cases. They forget the distinction between the power of a municipality merely to regulate, and the power to prohibit, with its incidental power to permit on any terms, however arbitrary.

Packard vs. Banton, 264 U. S. 140.
Cusack Co. vs. Chicago, 242 U. S. 526.

CONCLUSION

When the controversy in this case is properly focused, there are but two questions (Petitioner's brief p. 16):

1. Whether Section 1 of the ordinance puts an undue burden on an interstate carrier, by denying him his unrestricted choice of streets for the purpose of movement. Petitioner insists upon a negative answer to this question.

   Denver & R. G. R. R. vs. Denver, 250 U. S. 241.

2. Whether, as an incident to the right of passage under the Commerce clause, the carrier may use the streets to receive and discharge his cargo. Petitioner insists this should also be answered in the negative.

   James Gray vs. John Fraser, 62 U. S. 195.

While the police power of the state was surrendered to the Commerce clause to the extent of permitting passage without undue restriction, it was never contemplated that this carried with it a surrender of the purely local question of regulating or prohibiting the use of streets as the principal place of conducting private business, for the conduct of business in a street is not a matter of right.

Gilmer vs. Public Util. Comm. of Utah, 247 Pac. 284;

The Commerce clause avails nothing, for it, as all other provisions of the Constitution, protects only rights.

Respectfully submitted,

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